

AN ORDINANCE 2006-02-09-0192

AUTHORIZING A LICENSE AGREEMENT WITH BP SOUTH TEXAS BUILDING, LTD. FOR USE OF PUBLIC RIGHT OF WAY OVER AND UNDER PORTIONS OF EAST HOUSTON, NAVARRO STREET, AND PEACOCK ALLEY IN DISTRICT 1 FOR AN EXISTING TUNNEL, BASEMENT, AND SIMILAR USES FOR A 10 YEAR TERM; AND WAIVING THE FEE OF \$38,727 UNDER THE CITY'S INCENTIVE SCORECARD PROGRAM

* * * * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City hereby authorizes and directs granting, on terms consistent with prior ordinances, a license to BP South Texas Building, Ltd. to use public right of way of Houston and Navarro Streets and Peacock Alley for the following architectural features (1) an existing tunnel, (2) an existing basement, (3) existing roof cornices, (4) three existing ornamental balconies and (5) two light sconces, (6) three planters, (7) a fire escape, (8) a sidewalk, and (9) if and to the extent within the public right-of-way, existing concrete planters along Navarro Street, in Council District 1, for a 10-year term. The otherwise prescribed consideration, estimated at \$38,727, is waived in whole, contingent on the Licensee qualifying under the City's Incentive Scorecard Program.

SECTION 2. The fee has been waived in accordance with the 100% reduction provided under the Ordinance 97716 passed and approved by City Council on May 29, 2003.

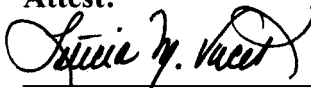
SECTION 3. The City further hereby authorizes and directs the City Manager or her designee: (A) to execute and deliver (1) a License Agreement substantially in the form attached hereto as Exhibit A and (2) all other documents necessary or convenient to effect the transaction contemplated in the License Agreement; and (B) otherwise to do all things necessary or convenient to effect the transaction, including agreeing to non-material changes to the terms thereof.

SECTION 4. This ordinance shall become effective February 19, 2006.

PASSED AND APPROVED this 9th day of February 2006.

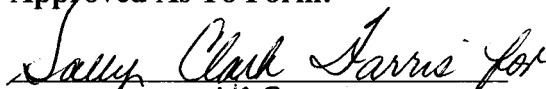

M A Y O R
PHIL HARDBERGER

Attest:



City Clerk

Approved As To Form:



City Attorney KLB

Agenda Voting Results

Name: 14.

Date: 02/09/06

Time: 11:20:30 AM

Vote Type: Multiple selection

Description: An Ordinance authorizing a license agreement with BP South Texas Building, Inc. for use of public right of way over and under portions of East Houston, Navarro Street, and Peacock Alley in District 1 for an existing tunnel, basement, and similar uses for a 10 year term; and waiving the fee of \$38,727.00 under the City's Incentive Scorecard Program. [Presented by Shawn Eddy, Interim Director, Asset Management; Erik J. Walsh, Assistant to the City Manager]

Voter	Group	Status	Yes	No	Abstain
ROGER O. FLORES	DISTRICT 1	Not present			
SHEILA D. MCNEIL	DISTRICT 2		x		
ROLAND GUTIERREZ	DISTRICT 3		x		
RICHARD PEREZ	DISTRICT 4		x		
PATTI RADLE	DISTRICT 5		x		
DELICIA HERRERA	DISTRICT 6		x		
ELENA K. GUAJARDO	DISTRICT 7		x		
ART A. HALL	DISTRICT 8		x		
KEVIN A. WOLFF	DISTRICT 9		x		
CHIP HAASS	DISTRICT_10		x		
MAYOR PHIL HARDBERGER	MAYOR		x		

Exhibit A

License Agreement

(BP South Texas Building, Ltd.)

This License Agreement ("License") is entered into by and between the City of San Antonio, a Texas municipal corporation, as "Licensor," acting by and through its City Manager, or the designee, pursuant to the Authorizing Ordinance and the Licensee named below.

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1. Pertinent Information.

Authorizing Ordinance

(No. and Date):

Project No. SP 489

Licensee: BP South Texas Building, Ltd.

Licensee's Address: 2835 Douglas Avenue, Suite 770, Dallas, Texas 75225

Term: 10 Years from the Effective Date

Fee: The fee would be \$38,727.00, but it is waived based on the Licensor's compliance with the City's Incentive Scorecard System.

Premises: Public rights-of-way over and under portions of East Houston Street, Navarro Street, and Peacock Alley adjacent to NCB 407 as shown graphically on **Exhibit A**, which is incorporated herein for all purposes as if it were fully set forth.

Scope of License: Use and maintain the following architectural features (1)-an existing tunnel under East Houston Street extending to the City owned Houston Street Garage, (2)-an existing basement under East Houston Street, (3)-existing roof cornices over East Houston and Navarro Streets and Peacock Alley, (4)-three existing ornamental balconies and (5)-two light sconces over East Houston Street, (6)-three existing oversized concrete planters on East Houston Street, (7)-a fire escape,, (8)-a sidewalk over Peacock Alley, and (9) if and to the extent within the public right-of-way, five existing concrete planters along Navarro Street..

Effective Date: January 22, 2004.

Licensor's Address: City Clerk, City of San Antonio, P.O. Box 839966/2nd Floor, City Hall, San Antonio, Texas 78283-3966

2. Grant of License.

Licensor grants Licensee a license ("License") to use, maintain, and operate the Premises within the Scope of the License. This License is limited to the stated Term.

3. Restrictions on Use/Recording

3.01 This License does not grant Licensee authority to use any public rights-of-way beyond the Premises.

3.02 Licensor's Superior Interest. This License grants only a privilege to use the Premises and is revocable by Licensor. This instrument does not convey any real property interest. Licensor reserves the right to enter upon the Premises at any time for asserting its real property interest or for other purposes.

3.03 Recording. A Memorandum of License Agreement, incorporated herein as **Exhibit "B"**, will be recorded by Licensor in the Official Public Records of Real Property of Bexar County, Texas. Licensee is responsible for recording fees.

4. License Fee

The entire fee is waived under Licensor's Incentive Scorecard Program contingent on Licensee's compliance with the terms of this agreement. If Licensee breaches this agreement, Licensor may declare Licensee in default.

5. Construction, Maintenance, and Operations

5.01 Costs. Licensee is solely responsible for all costs of construction, installation, repairs, maintenance, operation, and the like of any property placed in the Premises, (hereafter "Licensee's Responsibilities").

5.02 No Liability. Licensor assumes no liability or no expense under this License. Licensor is not liable to Licensee or otherwise for damage to the Premises arising from or related to activities of Licensor in the vicinity.

5.03 Relocation. If Licensor's needs require relocation, maintenance, or adjustment in the Premises or improvements by Licensee thereto, the relocation, maintenance, or adjustments will be at Licensee's sole cost and expense.

5.04 Maintenance. Licensee, at its sole cost and expense, must maintain all improvements constructed or installed by Licensee. In so doing, Licensee must adhere to all applicable safety standards and must adhere to all federal, state, or local laws, rules, or regulations.

5.05 No Power to Bind. Licensee cannot not bind or permit other to bind Licensor for payment of money or for any other obligation.

5.06 Contractors and Subcontractors. Licensee must promptly pay anyone who could file a mechanics' or materialmen's lien on the Premises. If any such lien is filed, Licensor may treat it as an event of default and terminate this License by delivering 10 days prior written notice to Licensee. Licensee remains obligated to clear the lien without cost to Licensor even after termination.

6. Specific Conditions

Licensee is bound by the conditions described in the "**Letter of Agreement**" appearing at **Exhibit "C"**, which is incorporated herein for all purposes as if it were fully set forth.

7. Indemnity

7.01 Licensee must indemnify Licensor and its elected officials, employees, agents, and representatives of and from any all loss, cost, liability, or expense, including court costs and attorneys fees, arising from or relating to (a) the grant of this License, (b) Licensee's activities under this License, (c) or Licensee's activities or presence on or about the Premises, whether or not authorized by this License.

7.02 Nothing in this License waives any governmental immunity or other defenses available to Licensor under Texas law and without waiving any defenses of the parties under Texas Law.

7.03 This indemnity expressly covers the consequences of indemnitees' own negligence, except when Licensor's active negligence is the sole cause of the damages made the basis of a claim.

7.04 Licensee must promptly advise Licensor in writing of any claim or subject to this indemnity and must investigate and defend such claim at Licensee's cost. Notwithstanding any insurance policy, Licensor may, at its own expense, participate in the defense without relieving Licensee of any of its indemnity obligations.

8. Insurance

8.01 Without limiting Licensor's rights to indemnity, Licensee must provide and maintain insurance, at its own expense, with companies admitted to do business in the State of Texas and with a rating of A- or better by A. M. Best and Company or provide evidence of self-insurance, in the following types and amounts:

Type	Amount
1. Worker's Compensation during the performance of improvements to the Premises or an approved alternate plan at other periods during the Term.	Statutory, with a waiver of subrogation in favor of Licensor
2. Employers' Liability during improvements to the Premises or an approved alternate plan at other periods during the Term.	\$500,000 per category, with a waiver of subrogation in favor of Licensor
3. Commercial General (Public) Liability – to include coverage for the following where the exposure exists: (a) Premises/Operations (b) Independent Contractors (c) Products/Completed (d) Personal Injury Liability (e) Contractual Liability (f) Explosion, Collapse and Underground Property (g) Broad Form Property Damage	For Bodily Injury and Property Damage: \$1,000,000 per Occurrence, \$2,000,000 general aggregate or its equivalent in Umbrella or Excess Liability coverage.
4. Property Insurance -- for physical damage to the property of Licensee including improvements and betterments to the Premises.	Coverage for a minimum of 80% of the actual cash value of the improvements.

Any substitute for Workers' Compensation and Employer's Liability must be approved in advance by Licensor's Risk Manager.

8.02 Licensor's Risk Manager may reasonably modify the requirements set forth above if he determines that such modification is in the Licensor's best interest. If Licensee believes the requested change is unreasonable, Licensee has 60 days to give notice of termination. The termination provisions hereof then apply.

8.03 With respect to the above required insurance, each insurance policy required by this License must contain the following clauses:

"No insurance or self-insurance provided by Licensee can be canceled, limited in scope or coverage, or non-renewed until after 30 days' prior written notice has been given to:

- (a) City Clerk, City of San Antonio
City Hall/Military Plaza
P.O. Box 839966/2nd Floor, City Hall
San Antonio, Texas 78283-3966
Attention: Risk Manager

And

- (b) Department of Asset Management
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966
Attention: Property Disposition Manager"

"Any insurance or self-insurance provided by Licensee is primary to any insurance or self-insurance maintained by the City of San Antonio."

"Any insurance or self-insurance maintained by the City of San Antonio applies in excess of, not in contribution with, insurance provided by this policy."

8.04 Each insurance policy required by this License, excepting policies for Workers' Compensation, Employer's Liability and Professional Liability, must contain the following clause:

"The City of San Antonio, its elected officials, employees, agents, and representatives are added as additional insureds."

8.06 Licensee must deliver to Licensors, within 30 days after the Effective Date, endorsements to the above-required policies adding the applicable clauses referenced above. Such endorsements must be signed by an authorized representative of the insurance company and show the signatory's company affiliation and title. Licensee must deliver to Licensors documentation acceptable to Licensors confirming the authority of those signing the endorsements.

8.07 The Notices and Certificates of Insurance must be provided to:

- (a) City Clerk, City of San Antonio
P.O. Box 839966/2nd Floor, City Hall
San Antonio, Texas 78283-3966
Attn: Risk Manager

And

- (b) Department of Asset Management
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966
Attn: Property Disposition Manager

8.08 This License does not limit Licensee's liability arising out of or related to the Premises or Licensee's activities thereon.

8.09 Licensee waives all claims against Licenser for injury to persons or property on or about the Premises, whether or not caused by Licenser's negligence.

9. Termination

9.01 Licenser may terminate this License at any time before expiration by giving Licensee 30 days written notice.

9.02 Upon expiration or termination, all rights and privileges immediately cease, and Licensee must immediately cease use of the Premises. Licenser, at its option, may direct Licensee to either (a) abandon the encroaching improvements and appurtenances, including lines and equipment; or (b) remove all or any part of the improvements and appurtenances and restore the Premises, at Licensee's sole cost, to original condition. Improvements or appurtenances not removed within 90 days after termination of the License, whether by expiration or otherwise, become the property of Licenser. Licenser, may without liability to Licensee, dispose of such property at a public or private sale, without notice to Licensee. Licensee is liable for Licenser's costs incurred in connection with Licensee's property.

10. Assignment/Sublicensing

This License cannot be assigned or sublicensed by Licensee, other than to Licensee's parent or subsidiaries. Licensee must give Licenser 30 days prior written notice before assigning or sublicensing to a parent or subsidiary. Licensee cannot lease or sublease the Premises.

11. Condemnation

If the Premises are taken, in whole or in part, by eminent domain, then this License, at the option of Licenser, ceases on the date title to the land so taken or transferred vests in the condemning authority. Licensee waives all rights to any condemnation proceeds. Licensee may seek a separate condemnation award.

12. Attorney's Fees and Court Costs.

In any action in which Licensee is found to have materially defaulted hereunder, Licensors can recover from Licensee its reasonable attorney's fees.

13. Taxes and Licenses

Licensee must pay, on or before their respective due dates, to the appropriate collecting authority, all federal, state, and local taxes, license fees, permit fees, debts, and obligations, now or hereafter levied on the Premises or on Licensee or its property.

14. Miscellaneous Provisions

14.01. Relationship Limited. This instrument creates only the relationship of Licensors and Licensee. The parties are not principal and agent, partners, joint venturers, or participants in any other enterprise between them.

14.02. Nondiscrimination. Licensee must not discriminate against any individual or group on account of race, color, gender, age, religion, national origin, or handicap, in employment practices or in the use of the Premises.

14.03. Release From Liability/Notice of Sale. If Licensors transfers ownership of the Premises, Licensors will have no liability or obligation relating to the period after transfer. Licensors's transferee will succeed to all Licensors's rights hereunder.

14.04. Subsequent Voluntary Transfer by Licensors. Upon written request, Licensee must, in writing,

(a) subordinate this License to the interest of any transferee of the Premises and to the lien of any mortgage or deed of trust, now or hereafter in force encumbering the Premises and to all advances made or hereafter to be made upon the security thereof

(b) attorn to any transferee of Licensors and

(c) if Licensee is not in default hereunder, execute and deliver a Certificate of Estoppel and Subordination, Non-Disturbance and Attornment Agreement in form and substance acceptable to Licensors, if the transferee agrees not to disturb Licensee's possession of the Premises.

14.05. Foreclosure. Licensee must attorn to the purchaser at any foreclosure sale and recognize such sale and such purchaser as Licensors, if the purchaser recognizes Licensee's rights under this License and agrees not to disturb Licensee's possession of the Premises so long as Licensee is not in default hereunder.

14.06. Licensee Financing. Licensee may encumber Licensee's personal property located within the Premises, and any lien of Licensors against Licensee's

personal property (whether by statute or under the terms of this License) is subject and subordinate to such security interest. Licensor will execute such documents as Licensee's lenders may reasonably request in connection with any such financing, if the documents do not modify the rights and obligations of this License. The City Manager of the City of San Antonio or a designee, including the Director, Department of Asset Management, is authorized hereunder to execute such documents, without the necessity of a specific City of San Antonio ordinance. But if the documents modify the rights and obligations of the License, then the documents can be approved only by specific ordinance.

14.07. Lien For License Fee, Taxes, Fees And Other Charges. Licensee grants Licensor a security interest in all Licensee's property now or hereafter placed on the Premises. The security interest secures payment of the Fee and all taxes, fees, and other charges to be paid by Licensee hereunder. Encumbered property may be disposed of free of the security interest in the ordinary course of business. At Licensor's request, Licensee must execute and deliver to Licensor a financing statement. This security interest is cumulative of any liens provided by law.

14.08. Consent/Approval Of Licensor. Licensor's consent and approval may be granted by the Director, Department of Asset Management, City of San Antonio ("City"), as designee of the City Manager, unless the City Charter requires that the City Council consent by the passage of a City ordinance.

14.09. Conflict of Interest.

(a) The Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- (i) a City officer or employee;
- (ii) his parent, child or spouse;
- (iii) a business entity in which the officer or employee, or his parent, child or spouse owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity;
- (iv) a business entity in which any individual or entity above listed is a (i) subcontractor on a City contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

(b) Contractor warrants and certifies as follows:

(i) Contractor and its officers, employees and agents are neither officers nor employees of the City.

(ii) Contractor has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

(c) Contractor acknowledges that City's reliance on the above warranties and certifications is reasonable.

14.10. Yielding Up. Licensee must, at termination, whether by expiration or otherwise, yield the Premises up peacefully, including any improvements and fixtures (other than trade fixtures).

14.11. Authority To Execute. The party or parties executing this License on behalf of Licensee personally warrant that each of them has full authority to do so.

14.12. Acknowledgment Of Reading. The parties acknowledge that they have thoroughly read this License, including any exhibits or attachments, and have sought and received whatever advice and counsel was necessary to form a full and complete understanding of their rights and obligations and, having so done, execute this License freely and voluntarily.

14.13. Applicable Law. This License is entered into in San Antonio, Bexar County, Texas. **The Construction Of This License And The Rights, Remedies, And Obligations Arising Thereunder Are Governed By The Laws Of The State Of Texas.** But the Texas conflicts of law rules must not cause the application of the laws of a jurisdiction other than Texas. The obligations performable hereunder by both parties are performable in San Antonio, Bexar County, Texas.

14.14. Severability. If any portion hereof is determined to be invalid or unenforceable, the determination does not affect the remainder hereof.

14.15. Successors. This License inures to the benefit of and binds the heirs, representatives, successors, and permitted assigns of each party. This clause does not authorize any assignment not otherwise authorized.

14.16. Integration. **This Written License Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

14.17. Modification. This License may not be changed orally but only by a written agreement, signed by the party against whom enforcement of any modification is sought. No such modification, express or implied, affects the right of the modifying party to require observance of either (i) any other term or (ii) the same term or condition as it applies on a subsequent or previous occasion.

14.18. Third Party Beneficiaries. This License is intended for the benefit of the parties hereto and their successors and permitted assigns only. There are no third party beneficiaries.

14.19. Notices. Any notice provided for or permitted hereunder must be in writing and by certified mail, return receipt requested, addressed to the parties at their respective addresses set forth at the beginning. If the addressee is a corporation, notices must be addressed to the attention of its President. The giving of notice is complete three days after its deposit, properly addressed and postage prepaid, with the United States Postal Service. Failure to use certified mail does not defeat the effectiveness of notice actually received, but such notice is effective only on actual receipt. Address for notice may be changed by giving notice hereunder.

14.20. Pronouns. In construing this License, plural constructions include the singular, and singular constructions include the plural. No significance attaches to whether a pronoun is masculine, feminine, or neuter. The words "herein," "hereof," and other, similar compounds of the word "here" refer to this entire License, not to any particular provision of it.

14.21. Captions. Paragraph captions in this License are for ease of reference only and do not affect the interpretation hereof.

14.22. Counterparts. This License may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of the number of counterparts, they constitute only one agreement. In making proof of this License, one need not produce or account for more counterparts than necessary to show execution by or on behalf of all parties.

14.23. Further Assurances. The parties must execute and deliver such additional documents and instruments as may be required to effect fully the provisions hereof. No such additional document(s), however, may alter the rights or obligations of the parties as contained in this License

14.24.. Ambiguities Not to Be Construed against Drafter. Any ambiguities found in this License must be resolved without resort to construction against the drafter.

Executed to be effective on the Effective Date.

Licensor:

City of San Antonio, a Texas municipal corporation

By: _____

Printed

Name: _____

Title: _____

Date: _____

Licensee:

BP South Texas Building, Ltd., a Texas limited partnership, by and through its sole general partner

BP South Texas GP, L.L.C., a Texas limited liability company

By: _____

Printed

Name: _____

Title: _____

Date: _____

Attest:

City Clerk

Approved As To Form:

City Attorney

Exhibit "A" (The Premises)

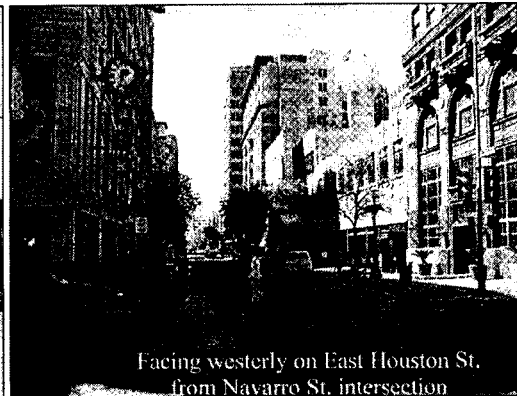
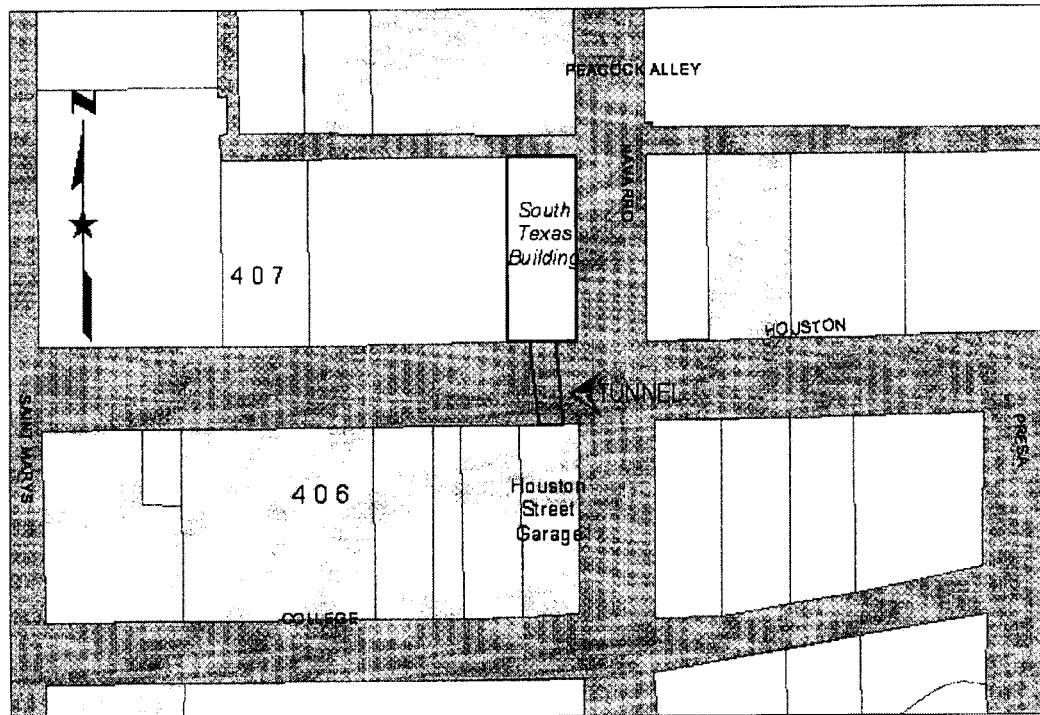


Exhibit "A"

S. P. No. 489

Petitioner: BP South Texas Building, Ltd.